

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL PAUL WILLIAMS,

Plaintiff,

v.

SCOTT KERNAN, et al.,

Defendants.

No. C 07-5574 MMC (PR)

**ORDER SETTING BRIEFING
SCHEDULE FOR FILING OF
DISPOSITIVE MOTION;
ADDRESSING PLAINTIFF'S
PENDING MOTIONS**

(Docket Nos. 22, 25, 27 & 30)

On November 1, 2007, plaintiff, a California prisoner incarcerated at Pelican Bay State Prison ("PBSP") and proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983 against various PBSP employees, claiming deliberate indifference to his serious medical needs and seeking injunctive relief. On April 18, 2008, the Court found the complaint stated cognizable claims for relief against defendants J. Flowers, Sue Risenhoover, Dr. Michael Sayre, Joseph Kravitz, Maureen McLean, N. Grannis and R. Pimental, and ordered the complaint served on those defendants. The Court further found plaintiff had not stated cognizable claims for relief against defendants Scott Kernan, Robert Horel and C. Scavetta; consequently, the Court dismissed those defendants and granted plaintiff leave to file an amended complaint curing the pleading deficiencies explained in the order. On June 23, 2008, plaintiff filed an amended complaint from which the claims against defendants Kernan, Horel and Scavetta had been stricken.

On July 16, 2008, the case was referred to the Northern District's Pro Se Prisoner Mediation Program. On November 19, 2008, Magistrate Judge Nandor Vadas reported that a settlement conference was held on November 6, 2008, and that the parties were unable to

1 reach a settlement agreement. (Docket No. 24.) Consequently, the Court will set a briefing
2 schedule, as set forth below, with respect to defendants' filing of a dispositive motion.

3 The Court also addresses herein various procedural motions filed by plaintiff. First,
4 plaintiff has filed a motion asking the Court to rule on his amended complaint. The motion is
5 hereby DENIED as moot. The amended complaint raises no new claims against the
6 defendants who already have been served herein; consequently, no review of the amended
7 complaint by the Court is necessary under 28 U.S.C. § 1915A, and plaintiff is responsible for
8 serving the amended complaint on defendants.

9 Next, plaintiff has filed two motions asking the Court to order prison officials to
10 provide him with four hours of library access per week, so that he may prepare his opposition
11 to defendants' motion for summary judgment. The motions are hereby DENIED as
12 premature; no motion for summary judgment has yet been filed.

13 Finally, plaintiff moves for the appointment of counsel to represent him in this action.
14 There is no constitutional right to counsel in a civil case such as this. See Lassiter v. Dep't of
15 Social Services, 452 U.S. 18, 25 (1981). Rather, pursuant to 28 U.S.C. § 1915, a district
16 court has the power to "request" that counsel represent a litigant who is proceeding in forma
17 pauperis. 28 U.S.C. § 1915(e)(1). The decision to request counsel to represent an indigent
18 litigant under § 1915 is within "the sound discretion of the trial court and is granted only in
19 exceptional circumstances." Franklin v. Murphy, 745 F.2d 1221, 1236 (9th Cir. 1984). A
20 finding of "exceptional circumstances" requires an evaluation of (1) the likelihood of the
21 plaintiff's success on the merits, and (2) the plaintiff's ability to articulate his claims pro se in
22 light of the complexity of the legal issues involved. See Agymen v. Corrections Corp. of
23 America, 390 F.3d 1101, 1103 (9th Cir. 2004). To date, plaintiff has been able to present his
24 claims in an adequate manner and there are no exceptional circumstances warranting
25 appointment of counsel at this time. Should the circumstances of the case materially change,
26 the Court may reconsider plaintiff's request sua sponte.

27 Additionally, the Court hereby orders as follows:

28 1. Within **ninety (90)** days of the date this order is filed, defendants shall file a

1 motion for summary judgment or other dispositive motion with respect to the claim found to
2 be cognizable above.

3 a. If defendants elect to file a motion to dismiss on the grounds plaintiff failed
4 to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
5 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune,
6 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810
7 (2003).

8 b. Any motion for summary judgment shall be supported by adequate factual
9 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil
10 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**
11 **qualified immunity found, if material facts are in dispute. If defendants are of the**
12 **opinion that this case cannot be resolved by summary judgment, defendants shall so**
13 **inform the Court prior to the date the summary judgment motion is due.**

14 2. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
15 served on defendants no later than **thirty (30)** days from the date defendants' motion is filed.

16 a. In the event defendants file an unenumerated motion to dismiss under Rule
17 12(b), plaintiff is hereby cautioned as follows:¹

18 The defendants have made a motion to dismiss pursuant to Rule 12(b) of
19 the Federal Rules of Civil Procedure, on the ground you have not exhausted
20 your administrative remedies. The motion will, if granted, result in the
21 dismissal of your case. When a party you are suing makes a motion to dismiss
22 for failure to exhaust, and that motion is properly supported by declarations (or
23 other sworn testimony) and/or documents, you may not simply rely on what
24 your complaint says. Instead, you must set out specific facts in declarations,
depositions, answers to interrogatories, or documents, that contradict the facts
shown in the defendant's declarations and documents and show that you have
in fact exhausted your claims. If you do not submit your own evidence in
opposition, the motion to dismiss, if appropriate, may be granted and the case
dismissed.

25 b. In the event defendants file a motion for summary judgment, the Ninth
26 Circuit has held that the following notice should be given to plaintiffs:

27 ¹The following notice is adapted from the summary judgment notice to be given to pro
28 se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).
See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 The defendants have made a motion for summary judgment by which
2 they seek to have your case dismissed. A motion for summary judgment under
Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

3 Rule 56 tells you what you must do in order to oppose a motion for
summary judgment. Generally, summary judgment must be granted when there
4 is no genuine issue of material fact--that is, if there is no real dispute about any
fact that would affect the result of your case, the party who asked for summary
5 judgment is entitled to judgment as a matter of law, which will end your case.
When a party you are suing makes a motion for summary judgment that is
6 properly supported by declarations (or other sworn testimony), you cannot
simply rely on what your complaint says. Instead, you must set out specific
7 facts in declarations, depositions, answers to interrogatories, or authenticated
documents, as provided in Rule 56(e), that contradict the facts shown in the
8 defendants' declarations and documents and show that there is a genuine issue
of material fact for trial. If you do not submit your own evidence in opposition,
9 summary judgment, if appropriate, may be entered against you. If summary
judgment is granted in favor of defendants, your case will be dismissed and
10 there will be no trial.

11 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
12 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S.
13 317 (1986) (holding party opposing summary judgment must come forward with evidence
14 showing triable issues of material fact on every essential element of his claim). Plaintiff is
15 cautioned that failure to file an opposition to defendants' motion for summary judgment may
16 be deemed to be a consent by plaintiff to the granting of the motion, and granting of
17 judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir.
18 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

19 3. Defendants shall file a reply brief no later than **fifteen (15)** days after plaintiff's
20 opposition is filed.

21 4. The motion shall be deemed submitted as of the date the reply brief is due. No
22 hearing will be held on the motion unless the Court so orders at a later date.

23 5. All communications by the plaintiff with the Court must be served on defendants,
24 or defendants' counsel once counsel has been designated, by mailing a true copy of the
25 document to defendants or defendants' counsel.

26 6. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
27 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is
28 required before the parties may conduct discovery.

8. Any motion for an extension of time must be filed no later than the deadline sought to be extended and must be accompanied by a showing of good cause.

IT IS SO ORDERED.

Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge